Supreme Court, U. S.
FILED
DEC 5 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1978

NO. 78-897

TEXAS EDUCATION AGENCY
(Austin Independent School District), et al,
Petitioner

v.

UNITED STATES OF AMERICA, et al,
Respondents

MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, et al,
Intervenors-Respondents

DEDRA ESTELL OVERTON, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, et al,
Intervenors-Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Austin Independent School District petitions for a writ of certiorari to review the opinion of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 564 F.2d 162 (1977) and is reproduced in the Appendix at 14. Petitioner filed a Petition for Rehearing *En Banc*. The Court of Appeals requested opposing parties to respond to the Petition for Rehearing and briefs were filed. On September 7, 1978, the Petition for Rehearing was denied with a written opinion, which is reproduced in the Appendix at 1. The Opinion and Order of the United States District Court for the Western District of Texas, Austin Division, entered August 1, 1973, is unreported and is reproduced in the Appendix at 94.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). This petition for certiorari is presented within 90 days of the date of the denial of the Petition for rehearing by the Court of Appeals.

QUESTIONS PRESENTED

1. Did the Court of Appeals comply with this Court's mandate when it again found unconstitutional segregation of Mexican-Americans solely by the application of a foreseeable consequences standard to disproportionate impact, thereby holding that a *prima facie* case of discrimination had been established and could not be rebutted by the School District?

2. Did the Court of Appeals apply an improper legal standard when it held that notwithstanding its determination of benign or benevolent motive, disproportionate effect will require a holding of invidious discriminatory intent or purpose?

3. Whether the Court of Appeals erred in rejecting a desegregation plan in which all schools with grades six through twelve were desegregated but because of the District Court finding, in compliance with *Swann*, that further desegregation of certain predominantly black elementary schools could only be carried out by the use of additional transportation imposing on elementary age children a risk to health and probable impingement on the educational process deemed to be prohibitive, additional desegregation was deemed to be impossible?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following constitutional and statutory provisions are involved in this case and are set forth in the Appendix: (a) Fourteenth Amendment to the United States Constitution; (b) 20 U.S.C. § 1701, § 1702(a)(4) and (5), § 1704, § 1705 and §1707; and (c) 42 U.S.C. § 2000c-6(a) and (b).

STATEMENT OF THE CASE

This case is before this Court for a second time. On December 6, 1976, this Court granted the School District's petition for certiorari to review the May 1976 opinion of the Court of Appeals and vacated the judgment and remanded for reconsideration in light of *Washington v. Davis*, 426 U.S. 229 (1976). *Austin Independent School District v. United States*, No. 76-200, 429 U.S. 990 (1976). Mr. Justice Powell, joined by the Chief Justice and Mr. Justice Rehnquist, wrote a concurring opinion. This petition seeks review of the opinion written by the Court of Appeals in response to this Court's remand for reconsideration.

A. The School District

The City of Austin is the capital of Texas and has long been a tri-ethnic community. Blacks and Mexican-Americans serve on the governing boards of its school district, county and city governments. Unlike many other cities, the Austin Independent School District (School District) began compliance with *Brown v. Board of Education*, 349 U.S. 294 (1955), almost immediately. In August 1955, the School District voluntarily adopted a desegregation plan commencing with the high school level and in 1963 this plan was extended to encompass all grades. In the 1960's the Department of Health, Education and Welfare repeatedly certified that the School District was in compliance with the Civil Rights Act of 1964.

The School District includes the City of Austin and certain adjoining areas. During the 1977 school year it operated 81 schools with approximately 59,000 students, approximately 15 percent of whom are black, 23 percent Mexican-American and 62 percent Anglo (non-Mexican-American whites). The City is bisected north and south by a major expressway (Interstate 35) and east and west by the Colorado River. Few bridges cross the river and these are, for the most part, located near the center of the City. Along the west side of Interstate 35 and in the center of the City are the downtown area, the State's Capitol Complex and the University of Texas. Few major east-west streets cross this area. As in other urban areas with significant ethnic populations, Austin has areas of residential ethnic and racial concentrations. The heaviest concentration of blacks and Mexican-Americans is located in the East Austin area which is geographically isolated by the Colorado River on the south, the downtown area,

the Capitol Complex, University of Texas and Interstate 35 on the west and the School District boundary on the north and east. Many Mexican-Americans have resided south of that area in the east and southeast portion of the School District, and Anglos have resided mostly in the west, south and north sections of Austin. The areas of black and Mexican-American concentrations have expanded and shifted over the past years and continued to expand and shift.

Austin is an urban area and a neighborhood school assignment policy has always been used, except as to blacks during the time when State statutes mandated the assignment of blacks to separate facilities. Until the start of a court-ordered desegregation plan, no extensive bus transportation system was used by the School District. The percentage of students transported at this time for any purpose is relatively small. Throughout the School District's history, Mexican-Americans have always been treated as "white." No statute, school board regulation or policy that requires segregation of Mexican-Americans exists or has ever existed and Mexican-Americans and Anglos have in fact attended Austin's schools together virtually at all times.

B. Procedural History

On August 7, 1970, the United States filed suit, pursuant to 42 U.S.C. § 2000c-6(a) and (b), against several school districts, including Austin, alleging segregation of Mexican-Americans and that prior segregation of blacks had not been fully remedied.

On June 28, 1971, after trial, the District Court issued a Memorandum Opinion and Order in which it found no

de jure segregation of Mexican-Americans, but that some all-black schools survived as vestiges of the prior dual system. App. 131. On July 19, 1971, an order was entered providing for the implementation of a plan to remedy these remaining vestiges. App. 108.

The United States appealed these orders to the Fifth Circuit, and certain individuals represented by the National Association for the Advancement of Colored People (NAACP) and by the Mexican-American Legal Defense & Educational Fund (MALDEF) were allowed to intervene in the appeal. The Fifth Circuit considered the appeal *en banc*, with 14 judges participating. On August 2, 1972, the Court issued seven opinions. 467 F.2d 848-891 (*Austin I*). One-half of the judges did not reach the merits because of the pendency of *Keyes v. School District No. 1, Denver, Colorado*, 413 U.S. 189 (1973), (then undecided), but because the Court was evenly divided, they joined with an eighth judge in voting to remand the case to the District Court without deciding the merits of the Mexican-American issue. See Judge Godbold's opinion, 467 F.2d at 889. The other six judges would have reversed the District Court on both the Mexican-American issue and the remedy issue. See Judge Wisdom's opinion, 467 F.2d at 852. Judge Wisdom would have abolished the distinction between *de jure* and *de facto* segregation and would have held all school racial or ethnic imbalance unconstitutional, regardless of the absence of a showing of discriminatory purpose, where the imbalance was "a natural and foreseeable consequence" of school board actions or inactions.

On remand, the District Court heard 12 days of new evidence and reconsidered the evidence from the prior

trial. On the basis of its reading of *Keyes*, the District Court held that the School District, because of past *de jure* segregation of blacks, had the burden of showing that there had been no *de jure* segregation of Mexican-Americans. On the issue of alleged segregation of Mexican-American students, the District Court noted that 11 out of 79 schools educated disproportionate numbers of Mexican-Americans. App. 96. The District Court reviewed all the evidence and found that in no area of its responsibilities had the School District ever acted with segregative intent or purpose toward Mexican-American students. App. 100. The statistical imbalance was found not to result from any statute, rule, regulation or policy of the School District prohibiting Mexican-American students from attending schools with Anglos, and not to be in any way related to the maintenance of the previously statutorily mandated black-white dual school system. App. 97. Having shifted the burden to the School District, the District Court found that the School District had met its burden of showing an absence of action motivated by a discriminatory intent or purpose. App. 100.

In fashioning a remedy to eliminate any remaining vestiges of the statutory segregation of blacks, the District Court considered the already complete integration of grades seven through twelve and the existence of a substantial number of integrated elementary schools. The Court found that the sixth grade could be integrated through the establishment of sixth grade center schools, but that additional integration of lower grades would involve "progressively massive transportation, uprooting of children in their earliest formative years, and would be educationally dysfunctional." The Court further found

that "the time required for transportation, risk to health, and probable impingement of education of students younger than the sixth grade would be prohibitive under any such plan." App. 103. After considering all aspects of the existing situation, the Court ordered the adoption of a plan that, combined with the previous plans and other steps ordered by the Court, achieved the greatest degree of desegregation possible, taking into account the practicalities of the situation.

The United States and the Intervenors appealed. After approximately two and one-half years, without oral argument, the Court of Appeals, through Judge Wisdom, the author of the minority opinion in 1972, issued an opinion reversing the District Court's holding that there had been no *de jure* segregation of Mexican-Americans. 532 F.2d 380 (1976), *vacated and remanded*, 429 U.S. 990 (1976) (*Austin II*), App. 51. The Court did not determine whether the District Court's findings of fact were clearly erroneous. Instead, it adopted a legal theory—that by the use of the natural and foreseeable consequences test, a neighborhood school assignment plan in areas of Mexican-American residential concentration could be deemed to be in itself unconstitutional—that made the factual findings irrelevant. A legal standard requiring the finding of unconstitutional segregation based upon the reasonably foreseeable effect of the use of neighborhood schools was adopted and under that standard the School District was inevitably held to have discriminated against Mexican-American students. The Court of Appeals also ordered a sweeping system-wide remedy.

The School District petitioned for certiorari and the Plaintiff-Respondent (United States through the Department of Justice) stated that it did not oppose the granting of the petition. The petition was granted, the judgment of the panel was vacated and the case was remanded for reconsideration in light of *Washington v. Davis*.

C. The Current Court of Appeals' Opinion (Austin III)

In *Austin III*, the Fifth Circuit has purported to reconsider its prior opinion after the remand by this Court. 564 F.2d 162 (1977), App. 14. After reconsideration, it has in effect simply reinstated its former decision in *Austin II* on the basis of the same reasoning. The Fifth Circuit has taken the disproportionate impact of official action and held that this alone is sufficient to show *de jure* segregation on the basis that schools with a disproportionate number of Mexican-Americans were a foreseeable consequence of actions by the School District. The Fifth Circuit, apparently writing only on the question of whether a *prima facie* case had been made out by Plaintiff-Respondent, treats as irrelevant both the District Court's findings of no intent or purpose to segregate and the Fifth Circuit's own finding in previous opinions, repeated in *Austin III*, that the principal actions and effects to which the Fifth Circuit applies its foreseeable consequences test were undertaken with a benign motive. The Fifth Circuit announced that it accepted the discriminatory purpose requirement as clearly enunciated by this Court, but it actually accepted it in name only and rejected it in fact and has again looked to effect in the form of the foreseeable consequences standard to provide the basis for holding all school racial or ethnic imbalance unconstitutional.

REASONS FOR GRANTING THE WRIT

This petition submits questions of the standards to be used in determining segregative intent when this Court's decisions in *Washington v. Davis* and *Arlington Heights*[1] are applied to school desegregation cases and the role of the foreseeable consequences standard used by some circuits to infer intent. Further presented are questions regarding application of the remedial standards set by this Court in *Swann*[2] and *Dayton*.[3] The School District submits that its petition for certiorari should be granted because (1) the Court of Appeals' opinion conflicts with the opinions of this Court; (2) there is conflict in the circuits as to the application of *Washington v. Davis* and *Arlington Heights* to school desegregation cases; and (3) the questions presented are of overriding national significance. Additionally, the effect of allowing the opinion in *Austin III* to stand may well be to reopen questions thought to have been settled by *Washington v. Davis* and *Arlington Heights.*

I.

THE LIABILITY FINDINGS AND THE CONFLICTS REGARDING THE PROPER ROLE OF DISPROPORTIONATE IMPACT AND THE FORESEEABLE CONSEQUENCES STANDARD

This Court noted in *Washington v. Davis* that in school desegregation cases discriminatory purpose was the

1. *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977).

2. *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971).

3. *Dayton Board of Education v. Brinkman*, 433 U.S. 406 (1977).

paramount factor, not impact. The fact that there are predominantly black and predominantly white schools in the community is not alone violative of the Equal Protection Clause. In *Austin II*, the Court of Appeals held unconstitutional the use of a neighborhood school assignment policy in a community with residential concentrations of Mexican-Americans because racially and ethnically imbalanced neighborhood schools was the foreseeable consequence of the use of the neighborhood school policy. The application of such a holding nationwide would have made neighborhood school assignment *per se* unconstitutional because, as Justice Powell noted in his concurring opinion in *Austin*, most larger cities with substantial minority populations, including Austin, have residential areas in which certain racial and ethnic groups dominate in the population. Had the *Austin II* reasoning been applied in *Washington v. Davis*, the continued use of Test 21 with its disproportionate impact, would have required a finding that the police department was motivated by discriminatory intent or purpose. The holding of the Fifth Circuit in *Austin II* was obviously in direct conflict with this Court's holding in *Washington v. Davis* and thus the Court summarily vacated *Austin II*.

This Court's disapproval of the *Austin II* standard was further illustrated by *Arlington Heights*. It was made clear there that determining whether invidious discriminatory purpose was the motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available. It was further noted, in footnote 21 in *Arlington Heights*, and in the subsequent case of *Mt. Healthy City School District Board of Education v. Doyal*, 429 U.S. 274 (1977), that even if the decision in question was motivated in part by an invidious

discriminatory purpose, the action would not necessarily be invalidated.

This Court did make clear that disproportionate impact does provide an important starting point since, as is obvious, without disproportionate impact there would be no cause to declare an act invidiously discriminatory.

Analysis of the holding of *Austin III* is difficult since the Fifth Circuit failed to recognize the allocation of the burden of proof made by the District Court. The District Court held that a *prima facie* case of unlawful segregation had been established by the plaintiffs, as did the district court in *Washington v. Davis,* and shifted the burden of proof to the School District to show the absence of segregative intent. Therefore, the issue before the Fifth Circuit became whether the District Court's determination that the School District's actions were not motivated by segregative intent was clearly erroneous. However, the appellate court addresses itself only to the question of whether a *prima facie* case had been established. That this is true is demonstrated by the Court's concern that "in neither *Washington v. Davis* nor *Arlington Heights* did the Supreme Court directly confront the issue of what type of official intent—subjective or objective—a plaintiff must show to present a *prima facie* case of impermissible racial or ethnic discrimination or segregation under the fourteenth amendment's equal protection clause." App. 26. Further evidence of this misconception by the Fifth Circuit is found when the Court again adverts to the evidence which demonstrates that segregation of Mexican-American students was "pervasive and intentional" and finds it "unnecessary, therefore, to determine whether absent this evidence the plaintiff could

nevertheless have made out a *prima facie* case of ethnic discrimination by relying upon one or both of the presumptions announced by the Supreme Court in *Keyes.*" The real question in the case, whether the School District has successfully rebutted the *prima facie* case of the plaintiffs by proving the absence of segregative intent, was not considered by the Fifth Circuit.

After an analysis of *Washington v. Davis, Arlington Heights* and related cases, the Fifth Circuit first concluded, in *Austin III,* that the vacation and remand of *Austin II* by this Court was based upon nothing more than a concern over "an ambiguity" as to whether the opinion in *Austin II* had allowed an inference of discriminatory intent solely from the use of a neighborhood school assignment policy. There should, of course, be no need to use the term "ambiguity" in view of the direct and specific holding on that point in *Austin II.* App. 70. In so doing, the Fifth Circuit misses the entire point of this Court's holdings in *Washington v. Davis* and *Arlington Heights.* This appears plainly from the fact that the Fifth Circuit holds that the District Court "applied an erroneous legal standard in assuming that there could not be discriminatory intent when the actions were prompted by what was thought at the time to have been a benign motive. . . ." App. 41. The Fifth Circuit quotes with approval from the minority opinion in *Austin I* and *Austin II* and notes that "a benign motive will not excuse the discriminatory effects of the school board's actions." App. 34. In the Fifth Circuit's opinion on motion for rehearing, noting that the clearly erroneous rule as required by Rule 52, FED.R.CIV.P., does not apply, the panel notes that "the intentional isolation of Mexican-American children is not excusable on the ground that

such treatment was inspired by a benevolent motive." App. 10. Thus, despite this Court's holdings in *Keyes, Washington v. Davis, Arlington Heights* and subsequent cases, the Fifth Circuit deems irrelevant the District Court's finding that the School District was actually motivated by a humane and compassionate use of then accepted and proper educational techniques and its desire to maintain neighborhood schools. Rather, if a disproportionate impact results, the Fifth Circuit will use the foreseeable consequences standard to override contrary and direct evidence and infer that the School District was motivated by an intent or purpose to segregate. It is clear that in the Fifth Circuit, effect is the paramount factor, not the motive, intent or purpose.

The invalidity of the Fifth Circuit's use of the foreseeable consequences test as the sole factor for determining segregative intent is readily seen when the discussion of the neighborhood school assignment policy is contrasted with this Court's holding in *Washington v. Davis.* The Fifth Circuit interprets *Washington v. Davis* as holding that when "the official actions challenged as discriminatory include acts and decisions that do not have a firm basis in well accepted and historically sound non-discriminatory social policy, discriminatory intent may be inferred from the fact that those acts had foreseeable discriminatory consequences. As a practical matter, in school desegregation cases we can envision few official actions, other than the decision to use the neighborhood school policy for student assignment, that would not be subject to the 'natural and foreseeable consequences' rule." App. 27. Disregarded is this Court's holding in *Washington v. Davis,* in reference to Test 21, in which it said "the test is neutral on its fact and rationally may be said to serve

a purpose the government is constitutionally empowered to pursue." 426 U.S. at 246. Further, this Court noted that "a rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be so far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory and licensing statutes. . . ." 426 U.S. at 248. *Washington v. Davis* does not, as the Fifth Circuit states, require that disproportionate impact, applied through the foreseeable consequences test, makes school board actions invidiously discriminatory unless the action has "a firm basis in well accepted and historically sound non-discriminatory social policy. . . ." Rather, if the action of the School Board is neutral on its face and rationally may be said to serve a purpose the School Board is constitutionally entitled to pursue, disproportionate impact does not render the action unconstitutional. The court must look past disproportionate impact and determine whether an actual intent or purpose to invidiously discriminate motivated the action in question. Notwithstanding this, the Fifth Circuit concludes that a discriminatory effect is the key issue since "a benign motive will not excuse the discriminatory effects of the school board's action." App. 34.

The Fifth Circuit would apply the foreseeable consequences test, focusing on disproportionate impact, to almost all official actions of a school board, other than the decision to use a neighborhood school policy for student assignment. In purportedly excepting the neighborhood school assignment policy from the operation of the foreseeable consequences standard, the Fifth Circuit begrudgingly acknowledges that somehow *Washington v.*

Davis and *Arlington Heights* have approved the neighborhood school assignment system. However, the Fifth Circuit immediately proceeds to make this exception meaningless by making clear that "the presumption [invidious discrimination resulting from application of the foreseeable consequences standard to disproportionate impact] is especially probative in assessing the official intent behind such affirmative school board decisions as those concerning school locations, the construction and renovation of schools, the closing of schools, the drawing of attendance zones and the assignment of faculty and staff." App. 27-28. The decisions to construct or close a school or to draw a certain attendance zone in order to maintain student proximity to the school site are no more than the separate decisional elements of the neighborhood school policy. While accepting the neighborhood school assignment policy in name, the Fifth Circuit, by its inference of segregative intent, condemns its operational decisions and thus, by indirection, the policy. Indeed, the panel would draw an inference of discriminatory intent if the School District did not make these operational decisions to ameliorate segregation, or racially or ethnically balance schools. See *Austin III*, App. 28. The Fifth Circuit views the neighborhood school policy as having been subject to "misuse" if disproportionate impact or racial or ethnic imbalance has occurred.

The *Austin III* holding that foreseeable consequences or disproportionate impact can be used to infer an invidious discriminatory intent or purpose is clearly in conflict with the requirement of *Washington v. Davis* and *Arlington Heights*. This conflict is demonstrated by the Court's reliance on *Monroe v. Pape*, 365 U.S. 167 (1961). The Fifth Circuit in analyzing the intent requirement of § 1983 as interpreted in *Monroe* and *Pierson v. Ray*, 386 U.S. 547, 556-57 (1967), noted the critical distinction between the foreseeable consequences test and any test requiring a determination of actual intent or motivation. Judge Goldberg stated that distinction clearly:

> We think it inconsistent to say in one and the same breath that a man is "responsible for the natural consequences of his actions," . . . and that he is responsible only if his actions are improperly motivated. *Whirl v. Kearn*, 407 F.2d 781, 788 (5th Cir. 1969).

Because purpose or intent to discriminate is an essential element of invidious discrimination, the foreseeable consequences test announced by this Court in *Monroe* is not determinative of an alleged constitutional violation in the form of official action motivated by an intent or purpose to segregate. As the Fifth Circuit has recognized in *Whirl*, application of the foreseeable consequences standard is not proper where improper motivation is required. Therefore, there is a disagreement not only within the Fifth Circuit as to the applicability of the foreseeable consequences standard but there is a division among the circuits as to whether the test is applicable.[4] In the interest of uniformity and sound judicial administration, this

4. The Second Circuit in *Hart v. Community School Board*, 512 F.2d 37 (2nd Cir. 1975) and the Eighth Circuit in *United States v. School District of Omaha*, 565 F.2d 127 (8th Cir. 1977), *cert. denied*, 434 U.S. 1064 (1978), used the foreseeable consequences standard to infer segregative intent. The Ninth Circuit, however, has repudiated the standard. *Soria v. Oxnard School District*, 488 F.2d 579 (9th Cir. 1973), *cert. denied*, 416 U.S. 951 (1974). *See also, Berkelman v. San Francisco Unified School District*, 501 F.2d 1264 (9th Cir. 1974), and *Johnson v. San Francisco Unified School District*, 500 F.2d 349 (9th Cir. 1974).

Court should clarify the use of the foreseeable consequences test based upon disproportionate impact.

Disproportionate impact coupled with the foreseeable consequences test cannot be the sole basis for a holding of intent or purpose to discriminate. Since all racial or ethnic imbalance, particularly with the present-day access to statistics and reliable projections, is to a certain degree foreseeable, any policy which permits such imbalance to continue, would, on a strictly objective measure such as a foreseeable consequence standard, amount to *de jure* segregation. Such a theory sweeps more broadly than necessary and collapses the distinction between *de jure* and *de facto* segregation. *See Arthur v. Nyquist*, 573 F.2d 134, 142, n.15 (2nd Cir. 1978).[5]

A brief review of the facts referred to by the Fifth Circuit shows the absence of any meaningful analysis of the facts as required by the clearly erroneous standard

5. The conclusion that a school board was motivated by invidious discriminatory intent or purpose is predetermined when the foreseeable consequences standard is applied to disproportionate impact. The commentators appear to agree that this is the case. For example, Professor Owen Fiss, whose writings are cited by Judge Wisdom in *Austin I*, *Austin II* and *Austin III*, has stated the effect of using the foreseeable consequences test to determine discriminatory intent or purpose:

> This [foreseeable consequences standard] is a plausible way of giving meaning to the concept of intent or purpose in the institutional setting; but it does so by obliterating the distinction between *de facto* and *de jure* segregation. If intent is to be construed from the effect that is foreseeable, then I would suggest that the limiting condition—segregative intent—does not have much bite: The segregation of the neighborhood school is no surprise.

Address by Professor Owen Fiss, Second Circuit Judicial Conference (Sept. 10-11, 1976), *reprinted at* 74 F.R.D. 279 (1977).

See also, The Supreme Court, 1976 Term, 91 HARV. L. REV. 70, 166-67 n. 33 (1977).

of Rule 52. Rather than a careful weighing of the evidence, the Fifth Circuit's holding can only be interpreted to mean that the *prima facie* case is irrebuttable and disproporationate impact, without more, infers invidious discriminatory purpose. The Fifth Circuit takes an adversary-like approach to the facts and in broad, conclusory statements, unsupported by the record, taken for the most part from the minority opinion in *Austin I* which was decided under an erroneous legal standard, looks only at one side of the facts and concludes that a *prima facie* case of *de jure* segregation has been made out. The Fifth Circuit clearly approached the case with the foregone conclusion that it would reach the same result in *Austin III* as it reached in *Austin I* and *Austin II*.

At the outset, it must be kept in mind that in Austin the number of schools and the number of students attending predominantly Mexican-American schools is relatively small. Plaintiffs and the District Court identified some 11 out of 79 schools which educated "disproportionately large numbers of Mexican-American students." Of these eleven schools, five opened as predominantly Anglo schools and, without any significant change in boundaries or other action by the School District, became predominantly Mexican-American schools because of changing residential patterns and the movement of minority groups into the school attendance zones. These 5 schools now educate some 2,257 Mexican-American students or approximately 16 percent of the total Mexican-American students in the School District. Of the other six predominantly Mexican-American schools which opened with a predominance of Mexican-American students, approximately 3,505 Mexican-Americans attend, constituting approximately 24 percent of the total Mexican-American

students in the School District, or 6 percent of the total students. The remainder of the Mexican-American students, approximately 59 percent, are distributed in other schools throughout the School District. All of these students attend school either in their neighborhood or in a school to which they have requested to be transferred under the School District's majority-to-minority transfer program. Therefore, the number of students on whom the neighborhood school assignment policy has a disproportionate impact is small when compared to the total students and to the total Mexican-American students within the School District.

First, Judge Wisdom finds that various School Board decisions confirmed "the existence of segregative intent that the statistics imply." App. 33. In contrast, *Dayton*, *Washington v. Davis* and Justice Powell's concurrence in *Austin* hold clearly that the fact that many schools are either predominantly white or predominantly black, without more, does not offend the Constitution. There is no "implication" of segregative intent by the mere existence of predominantly minority schools. Therefore, statistics cannot "imply" segregative intent. The statistical information is important because, it is obvious, without disproportionate impact there would be no cause of action.

The Fifth Circuit relies for the most part on "evidence" set out in the minority opinion in *Austin I*. The principal evidence to establish the *prima facie* case is the implication in *Austin III* that the School District maintained Mexican-American schools just as it maintained black schools. The record does not bear this out. In *Austin I*, Judge Wisdom found that the special schools or "Mexican

schools" as he now refers to them, were established with a "benign motive." This finding was confirmed in *Austin II*. App. 34. The District Court found that special schools were provided by the School District for the purpose of providing for the special needs of non-English speaking students and students who were members of migrant farm-working families. For example, a school called the Comal Street School was built to provide for the large number of non-English speaking pupils at Palm, Bickler and Metz Elementaries. Only non-English speaking students from Palm, Bickler and Metz attended these special schools. The school offered only grades one through three and students returned to their regular neighborhood schools when they learned to speak English or completed the third grade. The neighborhood school policy was continued in that Comal was located in the same area as Palm, Bickler and Metz. The District Court found that the purpose of the School District in constructing the Comal School was to make special provisions for non-English speaking students, clearly a legally proper educational purpose and not invidiously discriminatory. The Fifth Circuit simply ignores the fact that in 1924, the year the Comal School opened, a majority of the Mexican-American students living in the Palm, Bickler and Metz attendance zones attended these three majority Anglo schools. By 1935 the percentage of Mexican-American students living in the zones for and attending these three schools had increased to 75 percent. Similarly, during the time Zavala School (which replaced Comal Street School) had an open attendance zone and was used as a special school (1936-1954), substantial numbers of Mexican-American students attended schools with Anglo students in the other schools serving the East

Austin area. No Mexican-American was required to attend these schools and obviously many chose not to do so. The District Court determined that the School District did not establish these schools for a racially or ethnically discriminatory purpose but for the purpose of providing for students with limited or no ability to speak English. The District Court made no inference that discriminatory motive, purpose or intent could be inferred from the establishment of these schools and this finding is clearly supported by the evidence.

The Fifth Circuit says that Bickler School is evidence of a discriminatory intent or purpose. The evidence before the District Court showed that when the school closed as a regular elementary school, a majority of its students were Mexican-American students and these students were all assigned to Palm and Winn, the nearby majority Anglo schools. Judge Wisdom stated in his minority opinion in *Austin I* that "Mexican-Americans were expected to and did attend Zavala; whites attended Metz." This statement comes from the testimony of a former student who was unable to support this statement with anything other than his "assumption." Again, in 1973, the District Court found this not to be the case. Regardless of this finding, two of these special schools were closed long ago (Comal in 1936, West Avenue in 1946) and Zavala was given a separate attendance zone in 1954. Any effect of these schools has long since dissipated. While Judge Wisdom cites the West Avenue School as a school sharing a dual overlapping zone with Pease, an all white school, he fails to even consider the current condition existing in that area. West Avenue was located in West Austin, not East Austin, because the non-English speaking students and children of migrant

workers were living in the area. When these students learned to speak English, they went to Pease. West Avenue was closed in 1946. At this time, Pease has an enrollment substantially the same as the racial and ethnic makeup of the School District. Obviously, no inference can be drawn that the foreseeable consequence of Mexican-American students attending West Avenue was a segregated school since Pease, the school sharing the "dual overlapping zone", is not segregated. There is no disproportionate impact on which to base the foreseeable consequences test. This is ignored by the Fifth Circuit.

Apparently, it is conceded that the motive of the School District in establishing the special schools was benign and therefore no *actual* discriminatory intent or purpose was present. This clearly demonstrates the fallacy inherent in the foreseeable effects standard since use of the standard allows the Fifth Circuit to find on the one hand that the motive in establishing the schools was benign and therefore lacking in discriminatory intent or purpose but on the other hand to infer solely on the basis of disproportionate impact that the School District was motivated by discriminatory intent or purpose.

Without addressing the various types of evidence set out by this Court in *Arlington Heights*, the Fifth Circuit proceeds under a heading called "the post-*Brown* sequence of events indicating intentional racial discrimination." Again, the "evidence" comes from *Austin I*. The Fifth Circuit notes that O'Henry Junior High School opened in the western section of Austin and that the zone lines for Allan Junior High School were moved so that many whites were zoned out of Allan and into O'Henry. The Fifth Circuit fails to consider the fact

that O'Henry was built pursuant to the neighborhood school assignment policy and was built to serve the increasing number of students in West Austin. Before O'Henry opened, Allan had approximately 55 percent Anglo students and approximately 45 Mexican-American students. After O'Henry opened, the assignment of students to the schools nearest their homes resulted in the percentages being reversed with Allan having 45 percent Anglo and 55 percent Mexican-American. It is difficult to conceive how a change in the student ethnic makeup by 10 percentage points shows the School District to be motivated by an intent or purpose to discriminate.

Continuing to rely upon the disproportionate impact standard, the panel quotes *Austin I* for the proposition that the new Johnston High School opened with 78 percent Mexican-American enrollment and thereby somehow inferred discriminatory motive. The panel does not consider the evidence introduced by the School District in its rebuttal case which showed that the School District's decision to build Johnston disproved rather than proved an intent or purpose to segregate. Johnston was built pursuant to an independent consultant's recommendation and was built after the second and third high schools built in Austin were constructed. If Johnston had been built first, it would have removed most Mexican-American students from the only existing high school in Austin, Austin High School. The location of Johnston had no real bearing on whether it opened with a high concentration of Mexican-American students since the need was for a school to serve the large population in the geographically isolated area east of downtown and the boundary lines would have been substantially the same no matter where the school was located if the population was to

be served with a neighborhood school. The School District proceeded normally and in accordance with its neighborhood school construction plan and the historical background of the decision does not reveal any series of official actions taken for invidious purposes.

Similarly, Martin Junior High School was built to serve the neighborhood which had an increasing population of students and the boundaries were drawn upon the closing of University Junior High School to zone students to their nearest neighborhood school, taking into acount the geographical factors in the area. None of this evidence is considered by the Fifth Circuit.

The Court's reliance on disproportionate impact is further shown by its reference to statistics showing that a substantial number of Mexican-American teachers were assigned to schools populated predominantly by Mexican-American students. It notes that no school had a majority of Mexican-American faculty members. The presence of Mexican-American teachers in Mexican-American neighborhood schools is explainable for the most part on the basis of the schools' special programs, such as bilingual education, necessary to provide an equal educational opportunity to Mexican-American students. The teachers assigned to bilingual programs must, of course, be bilingual and there are more Spanish surnamed teachers who are bilingual than there are other teachers.

Referring to *Austin I*, the panel finds evidence of intent or purpose to discriminate by the use of portable classroom buildings in East Austin at the same time as new elementary schools were being built to relieve overcrowded conditions in areas outside of East Austin. Here

the panel's reasoning is most curious for on the one hand, the panel would find that the construction of a new school in the East Austin area, and its opening as a predominantly Mexican-American school, as it must if the neighborhood school policy were to be followed, provides evidence of discriminatory intent or purpose. On the other hand, not constructing a new school but using portable buildings to relieve overcrowding is also employed by the Court as further evidence of discriminatory intent or purpose. As is evident with the foreseeable consequences test, any action or failure to act by the School District which had a disproportionate impact will provide the necessary evidence to support a finding of intent or purpose. The panel overlooks the fact that the East Austin area is and was a densely populated area with very little vacant land and therefore when growth occurred, there was no land on which to build schools but instead portable buildings were used. Conversely, in suburban areas populated by predominantly Anglo students, growth occurred in the form of new housing developments spreading into previously vacant land. New schools were constructed in this area to meet growth in order to provide schools in the neighborhood of all students. This historical background of a racially neutral basis for the actions taken by the School District is ignored by the Court.

Finally, there is the assertion that desegregation plans for black students allowed black students to transfer to Mexican-American schools but not to Anglo schools. The evidence shows otherwise. The record does not indicate that Mexican-Americans were invariably assigned to black schools but not to Anglo schools and there is no argument that this policy was benign. Rather, the record

indicates that students were assigned to their neighborhood schools except for desegregation plans which provided for the desegregation of black students. These students were assigned to schools throughout the District, both predominantly Anglo and predominantly Mexican-American schools.

In summary, the School District's evidence before the District Court, rebutting the *prima facie* case, overwhelmingly establishes that the School District actions were not motivated by an impermissible intent or purpose to segregate. The panel ignores the School District's evidence and instead decides the case based upon findings in the minority opinion in *Austin I*. Apparently, no consideration whatsoever is given to the findings of fact made by the District Court in its 1973 opinion. The School District submits that a review of the record in the proper manner, under the clearly erroneous test, with due regard for the functions of the district and appellate courts as clarified in *Dayton*, leaves no doubt that the District Court's finding of no unconstitutional segregation of Mexican-American students is substantially and amply supported by the evidence and is not clearly erroneous.[6]

II.

THE CONFLICTS REGARDING DETERMINATION OF A PROPER REMEDY

The panel in *Austin III* consistently misstates the remedy imposed by the District Court. It first states

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6. For an extended discussion of the evidence, the School District is filing a copy of its brief to the Court of Appeals with the Clerk of this Court, a procedure followed by the Government in the prior petition for certiorari.

that the remedy was to desegregate "one grade in the black elementary schools—the sixth—leaving segregation untouched in the District's other grades and schools." It then goes on to discuss "the unique limitation on desegregation to the sixth grade" as being sufficient to raise "a fair inference of [intent] to continue extensive segregation. . . ." App. 17. It further improperly characterizes the School District's position as being one that suggests that the 1974 Educational Amendments, 20 U.S.C. § 1701, *et seq.* (1975) "somehow support this blanket exclusion." Finally it states "the partial desegregation of a single grade has no basis in logic or in equity as a remedy suited and efficient to rectify the constitutional deprivations inflicted by segregating school children." App. 43-44.

As this Court will clearly recognize, the panel simply misstates the facts to make these holdings. As the District Court held, the secondary schools, grades seven through 12, have been desegregated. The District Court found that only blacks were entitled to a remedy. As of the 1977-1978 school year, no high school within the School District has in excess of 33 percent black students and no junior high school has in excess of 43 percent black students, with most schools having a range of 10 percent to 15 percent. In view of its finding of no discrimination against Mexican-American students, the District Court's finding that the secondary schools were entirely desegregated was entirely correct. The District Court imposed an additional remedy by including the sixth grade of all schools within the desegregation plan. Under this plan, special sixth grade centers, housing only sixth graders, were set up throughout the School District. The sixth grade centers were carefully structured so that a

reasonable balance between black and Anglo students was created at the time of establishment of the schools. The setting up of this sixth grade center plan required the busing of approximately 1,900 additional students, about 60 percent of whom were Anglo.

In addition, certain other requirements were included in the desegregation plan, such as the establishment of a majority-to-minority transfer policy for both black and Mexican-American students, with the provision of free transportation, the hiring of elementary assistant directors to supervise and evaluate special programs, implementation of specific programs to aid minority students including bilingual/bicultural educational programs, and alteration of existing school attendance zones and the drawing of attendance zones for new schools to promote desegregation. See App. 104.

After having ordered this extensive plan, the District Court was faced with 8 elementary schools in the School District which had a majority of black students. These 8 schools were located in the east Austin area, which as the District Court noted, is a "relatively inaccessible part of Austin." East Austin is accessible to the northeast Austin area but use of these schools to improve racial balance in east Austin would, the District Court found, "upset the natural patterns of integration . . . and very likely result ultimately in total resegregation." Use of predominantly Mexican-American schools in Southeast Austin would, in the District Court's words, "be intolerable" because "schools with substantial Mexican-American populations cannot be made to carry a disproportionate share of the burden of desegregation." Use of the other elementary schools in Austin would require crossing Inter-

state 35, the downtown Austin area, the State Capitol and the University of Texas complexes. This the Court found "would involve progressively massive transportation, the uprooting of children in their earliest formative years, and would be educationally dysfunctional." App. 103. Therefore, relying on this Court's opinion in *Swann*, and considering the age of the children and the risk to health and probable impingement on the educational process, the District Court concluded that "the time required for transportation, risk to health and probable impingement of education for students younger than the sixth grade would be prohibitive under any such plan."

Thus, in devising a remedy to fit the nature and extent of the constitutional violation, a constitutional violation the Court found had ended, as to blacks, by 1963, the District Court explicitly followed this Court's directions in *Swann*, since reaffirmed in *Milliken v. Bradley*, 418 U.S. 717 (1974), and *Dayton*, and ordered a remedy which, taking into account the practicalities of the situation, achieved the maximum feasible desegregation. *Austin III* does not hold the findings of the District Court with regard to tailoring the scope of the remedy to be clearly erroneous. In effect these findings are disregarded. The fact that the District Court followed *Swann* precisely and made the necessary fact findings as this Court has directed is ignored.

In his concurring opinion on the remand of *Austin II*, Justice Powell recognized that the Court of Appeals may have erred by a readiness to impute to the school officials segregative intent far more pervasive than the evidence justified. He also noted that the Court of Appeals seemed

to have erred in ordering a desegregation plan far exceeding any identifiable violations of constitutional rights. As with other cities in the United States, there exists in Austin residential areas in which certain racial and ethnic groups predominate in the population, and the residential concentration problems are accentuated by the geography of the City and therefore nothing short of extensive cross-town transportation would suffice. He further noted that the remedy ordered appears to exceed that necessary to eliminate the effect of any official acts or omissions. Reliance upon the statistics in *Swann* and upon *Green v. County School Board*, 391 U.S. 430 (1968), was improper because the situation in Austin is simply not comparable. Any decree involving a remedy for prior segregation is unique in that the burden falls not upon the school district and its officials but rather upon innocent children and parents.

That the District Court correctly interpreted the law relating to the fashioning of an appropriate desegregation remedy is clearly seen by consideration of both this Court's decisions since the 1973 District Court Opinion and the Educational Amendments of 1974. This Court has continued to recognize the limitations on possible remedies.

As Justice Powell noted there is no evidence in the record available to this Court to suggest that absent constitutional violations the Austin school system would have been integrated to the extent contemplated by the plan set out in *Austin II*. Balancing individual and collective interests, including the specific concerns that relate to the family and to the concern of parents for the welfare and education of their children, especially those

of tender age, the District Court made the proper decision. The Court of Appeals has concluded, agreeing with the District Court, that nothing short of extensive cross-town busing would suffice. The time and distance involved with this extensive cross-town busing is the exact concern to which Congress addressed itself in the year following the District Court's opinion imposing a remedy. Congress declared, in 20 U.S.C. § 1701(a)(2) that the neighborhood is the appropriate basis for determining public school assignments. In § 1702(a)(4) and (5), Congress specifically found that "the risk and harms created by excessive transportation are particularly great for children enrolled in the first six grades" and that "transportation of students which creates serious risks to their health and safety impinges significantly upon their educational opportunity."

Therefore, acting in accordance with this Court's holding in *Swann* and with a later Congressional finding regarding the transportation of elementary age children, the District Court ordered the implementation of a proper remedy. The Court of Appeals, without finding either that the District Court clearly erred as required by Rule 52(b) or that it applied an impermissible legal standard, apparently decided that it was dissatisfied with the limited character of the remedy which the District Court had afforded and proceeded to reverse and order, at least by implication, a far more sweeping remedy. As in *Dayton*, the Court of Appeals did not actually specify a remedy but did in increasingly strong language imply that the remedy must be system-wide. Given the findings of the District Court concerning the unique problems presented by any further desegregation of elementary age children in Austin and the holding by

the Court of Appeals that nothing short of extensive cross-town busing would suffice to attain further desegregation, the District Court's opinion as to remedy correctly followed this Court's opinions and the Court of Appeals has erred in reversing.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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December 5, 1978